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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1234

Filed: 1 August 2017

Edgecombe County, No. 14 CVS 803

EMILY VIRGINIA BLOUNT WHITLEY, by and through her duly appointed Attorney-in-Fact, JOHN MARVIN WHITLEY, recorded in Book 2745, Page 603 Nash County Registry, Plaintiff

v.

MILTON J. WHITLEY and MARGARET W. CORINTH, Defendants

Appeal by plaintiff from orders entered 27 May 2016 and 27 June 2016 by Judge Walter H. Godwin, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 3 May 2017.

Thomas Law, P.A., by Albert S. Thomas, Jr., and David C. Braswell, for plaintiff-appellant.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for defendant-appellees.

CALABRIA, Judge.

Where there was no genuine issue of material fact as to the shares conveyed by various instruments, the trial court did not err in its partial summary judgment order. We affirm.

I. Factual and Procedural Background

Emily Virginia Blount Whitley, acting by and through her attorney-in-fact John Marvin Whitley (“plaintiff”), and Milton J. Whitley and Margaret W. Corinth (collectively, “defendants”), are the heirs of Cora P. Whitley (“the decedent”). The decedent died testate 15 June 1988, and devised her real property to Randolph Whitley (“Randolph”) and Lucille Eason (“Lucille”) as trustees for Thurman Whitley (“Thurman”). According to the will, upon Thurman’s death, Randolph and Lucille were to divide the real property between five of the decedent’s living children: Randolph, Dorothy Langley, David Whitley, and defendants. This was in contrast to a separate devise, which left personal property to all eight of the children. Plaintiff is the surviving spouse of Marvin H. Whitley, one of the three additional heirs who were not included in the devise of real property pursuant to decedent’s will, along with Theodore Whitley and Lucille. Thurman died on 24 September 1997.

On 31 September 2014, plaintiff filed an action against defendants, seeking a declaratory judgment and partition of real property and money owed. In her complaint, plaintiff alleged that, after Thurman’s death, the eight heirs agreed that they would each receive a 1/8 undivided interest in a specific piece of property located in Rocky Mount, North Carolina (“the property”). Plaintiff further alleged that the heirs collectively decided that each share would be valued at \$9,800, and that several heirs agreed to sell their interests to the other heirs. Plaintiff then alleged various

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conveyances, inheritances, and deaths, resulting in plaintiff and defendants remaining as the last interest-holders in the property. Plaintiff contended that she owned a $\frac{4}{7}$ interest in the property, that Margaret W. Corinth owned a $\frac{2}{7}$ interest in the property, and that Milton J. Whitley owned a $\frac{1}{7}$ interest in the property. Plaintiff alleged that, in 2009, the parties agreed to list the property, and ultimately agreed to lease the property to Lance Leeper (“Leeper”), who would rent the property, and ultimately purchase it for \$80,000. In November of 2011, a dispute arose between the parties; plaintiff alleged that defendants refused to pay their share of maintenance of the property from May of 2003 through March of 2009. In November of 2013, Leeper exercised his option to purchase the property, and once more a dispute arose as to the size of each party’s interest in the property. Plaintiff’s complaint thus sought declaratory relief to determine the size of each interest, partition to sale, and reimbursement for monies owed to plaintiff for maintenance of the property.

On 29 December 2014, defendants filed their answer and counterclaims. Defendants likewise sought a declaratory judgment to determine the size of each ownership interest. Defendants further argued that Leeper’s lease was for a two-year term, which expired before he exercised his option to purchase; that plaintiff, contrary to defendants’ instructions, unilaterally extended the term of Leeper’s lease; that during Leeper’s tenancy, plaintiff received rents from Leeper, and failed to disburse a share of these rents to defendants. Defendants thus additionally sought

an accounting of the rents received by plaintiff, as well as payment of their share of the rents, and an order prohibiting plaintiff from selling or leasing the property without defendants' express consent.

On 2 March 2016, defendants moved for a partial summary judgment on the matter of a declaratory judgment. This motion alleged that Margaret W. Corinth owned a 1/2 undivided interest in the property, that Milton J. Whitley owned a 1/4 undivided interest in the property, and that plaintiff owned a 1/4 undivided interest in the property. The motion referenced various deeds and wills. In an order filed 27 May 2016, the trial court granted defendants' motion for partial summary judgment, holding that "there is no genuine issue as to any material fact as to the ownership interests of the parties in the property which is the subject of this litigation[.]" The trial court determined that Margaret W. Corinth owned a 1/2 undivided interest in the property, that Milton J. Whitley owned a 1/4 undivided interest in the property, and that plaintiff owned a 1/4 undivided interest in the property. On 16 July 2016, plaintiff filed a motion to stay the proceedings, a motion to certify the case for appeal, and notice of appeal from the partial summary judgment order.

On 9 June 2016, defendants moved for partial summary judgment on their counterclaims for rent owed. In an order filed 27 June 2016, the trial court granted defendants' motion for a partial summary judgment, holding that "Defendants are entitled, as a matter of law, to a partial judgment declaring that Defendant-Margaret

W. Corinth is entitled to receive one-half of the sums being held by Plaintiff for rental payments received for the Property, that Defendant-Milton J. Whitley is entitled to receive one-fourth of the sums being held by Plaintiff for rental payments received for the Property, and that Plaintiff is entitled to receive one-fourth of the sums being held by Plaintiff for rental payments received for the Property.” The trial court then ordered plaintiff to remit payments accordingly. On 22 July 2016, plaintiff filed notice of appeal from the partial summary judgment order.

On 7 September 2016, the trial court entered a consent order. Pursuant to this order, plaintiff voluntarily dismissed, without prejudice, her claim against defendants for reimbursement for upkeep and maintenance of the property. The consent order further mandated the sale of the property.

Plaintiff moved to consolidate the appeals from the two partial summary judgment orders. This motion was granted. Plaintiff does not appeal from the consent order.

II. Standard of Review

“Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that ‘there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.’ ” *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

III. Analysis

In her sole argument on appeal, plaintiff contends that the trial court erred in granting a partial summary judgment with respect to the shares owned by each party. We disagree.

A. Family Settlement Agreement

First, plaintiff contends that there is a genuine issue of fact concerning the family settlement agreement. Specifically, plaintiff contends that the family agreed that the property should be distributed to eight heirs, instead of the five designated in the will, and that this agreement created a genuine issue of material fact.

Plaintiff cites our Supreme Court, which has held that “[w]hen [family settlement agreements] are fairly made and carry out the intent of the testator as gathered from the will, and do not adversely affect the rights of infants, they will be approved.” *First Union Nat. Bank of N.C. v. Bryant*, 257 N.C. 42, 50, 125 S.E.2d 291, 297 (1962).

Even assuming that there was a family settlement agreement, plaintiff did not allege that it had been executed in writing, nor is any such agreement to be found in the record on appeal. A family settlement agreement purporting to transfer an interest in real property must satisfy the statute of frauds. *See Holt v. Holt*, 47 N.C. App. 618, 620, 267 S.E.2d 711, 713 (1980), *rev'd on other grounds*, 304 N.C. 137, 282 S.E.2d 784 (1981). In the absence of a written document purporting to transfer an

interest in land, the trial court could not consider plaintiff's evidence of a family settlement agreement.

We hold that the trial court could not give effect to an agreement to transfer an interest in land absent a writing, pursuant to the statute of frauds. We further hold that the trial court did not err in concluding that no genuine issue of material fact existed with respect to the family settlement agreement.

B. Color of Title

Next, plaintiff contends that her interest could be proven by color of title. Notwithstanding any merit plaintiff's contentions may have, color of title was not alleged at trial, neither in the pleadings nor at the hearing on defendants' motion for partial summary judgment. " 'A contention not raised in the trial court may not be raised for the first time on appeal.' " *Clark v. Bichsel*, 239 N.C. App. 13, 17, 767 S.E.2d 145, 148 (2015) (quoting *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002)). Accordingly, we dismiss plaintiff's argument with respect to color of title.

C. Estoppel by Deed

Next, plaintiff contends that although Randolph and Lucille were not qualified as trustees at the time that the various heirs began conveying their interests to one another, estoppel by deed prevents the heirs from repudiating their conveyances. Plaintiff further contends that these conveyances are valid, notwithstanding the fact

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that Randolph and Lucille conveyed the property, pursuant to the decedent's will, to only five of the eight heirs.

The various conveyances at issue in this case occurred in 1998. However, the deed by which Randolph and Lucille, as trustees, conveyed the property to the five heirs was not recorded until 2000. Plaintiff contends that the various grantors and grantees cannot now, after the late recordation of the trustees' deed, repudiate those transfers.

The doctrine of estoppel by deed serves to estop a grantor, who has no title at the time of a conveyance but later acquires title, from asserting his after-acquired title against a grantee. That is to say, "[w]here a deed is sufficient in form to convey the grantor's whole interest, an interest afterwards acquired passes by way of estoppel to the grantee." *Baker v. Austin*, 174 N.C. 433, 434, 93 S.E. 949, 950 (1917) (citations and quotation marks omitted). Plaintiff argues, in essence, that because David Whitley and Theodore Whitley conveyed their interest to Lucille before the trustees' deed was recorded, that conveyance inured to Lucille's benefit after the trustees' deed was recorded, and by extension inured to the benefit of Lucille's sons, then to Marvin H. Whitley, then to plaintiff.

Plaintiff's contentions aside, nobody disputes that David Whitley possessed a share of the estate, that the subsequently-recorded trustees' deed ratified the earlier conveyance, and that plaintiff thereby received her share of the property. Rather, the

issue is that, the trustees' deed notwithstanding, there is no written evidence of the conveyance of 4/7 of the property to plaintiff. Theodore Whitley never received a share of the property by a written conveyance, and thus plaintiff's only shares were from David Whitley and Randolph. Plaintiff's estoppel by deed argument is, frankly, irrelevant to the issues before this Court.

D. Quasi-Estoppel

Finally, plaintiff contends that, because defendants accepted the benefits of her maintenance of the property, they cannot now dispute her majority interest in the property.

“Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument.” *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 881-82 (2004). “[T]he essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions.” *Id.* at 18-19, 591 S.E.2d at 882 (citation and quotation marks omitted). Plaintiff contends that she “advanced payments for the insurance and taxes and kept up the property. The conduct of the parties . . . has been that ownership is exactly as Plaintiff has shown.” Plaintiff asserts that her actions in maintaining the property at personal expense demonstrated her majority

ownership, and that the actions of defendants in declining to reimburse her demonstrate their acceptance of that benefit.

Even assuming *arguendo* that defendants' conduct constituted their acceptance of a benefit, plaintiff has failed to demonstrate how her advancement of that benefit – namely the maintenance of the property – demonstrated her majority ownership, or how defendants' acceptance of that benefit constituted an acceptance of her status as majority owner. Both defendants, in depositions, acknowledged that prior to litigation, they were unsure of the actual division of the property. Plaintiff's arguments suggest that it is inconceivable that a minority shareholder would act to preserve the property, and that other shareholders would permit this without reimbursement. Plaintiff cites several cases on quasi-estoppel generally, but no law suggesting that the actions of a shareholder in property to maintain that property demonstrate a majority ownership. As such, we hold that plaintiff has not demonstrated that defendants' conduct in accepting the benefit of plaintiff's maintenance of the property constituted acceptance of her majority position, such that they should now be estopped from denying it.

IV. Conclusion

We hold that the trial court did not err in its partial summary judgment. The documents in the record established, as a matter of law, the sizes of the various shares of the property conveyed and bequeathed. This record did not support plaintiff's

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contention that she owned a 4/7 share of the property, and her various allegations did not create a genuine issue of material fact.

AFFIRMED.

Judges DIETZ and MURPHY concur.

Report per Rule 30(e).